

Washington's high court considers new meaning for informed consent

APR 20, 2022

Tanya Albert Henry

Contributing News Writer

Imagine having to tell every parent who brings in a child with an earache that meningitis is a possibility, then offering them the option to test.

A court case before the Washington Supreme Court could create a new meaning of informed consent and put physicians and other health professionals in a position where they would have to tell patients all the potential diagnoses based on the symptoms they are presented with, no matter how remote the possibilities. It would expand the scope of liability by allowing a misdiagnosis claim to be brought under informed-consent statutes and undercut physicians' ability to make medical judgments.

The Litigation Center of the American Medical Association and State Medical Societies joined the Washington State Medical Association (WSMA), the Washington Chapter of the American College of Emergency Physicians, and the Washington State Hospital Association in filing an amicus brief explaining why the Washington Supreme Court must stop that from happening.

The amici asked the court to vacate an appellate court ruling in the case, *Davies v. MultiCare Health Systems*, and reinstate a trial court ruling. The trial court's decision followed existing state law and case law by dismissing an informed-consent claim. The patient said that the physician did not inform them of a test for a diagnosis that the doctor did not suspect and did not treat.

The appellate court ruling doesn't hold true to the meaning of informed consent in health care and if it is allowed to stand, it would "create a massive additional burden on emergency physicians and all physicians," and other health professionals, the brief says. "That will slow down, delay or deny care to patients. That the decision was issued in the midst of the COVID-19 health care crisis magnifies its error."

The brief asks the court to "consider just for a moment" the physicians and other clinicians delivering emergency care. "Think of them busily and rapidly ruling in and ruling out multiple medical problems

and treatment courses for the many patients who present at once. Imposing the obligation to inform patients in real time of potential tests or diagnostics for the conditions and diagnoses that have just been ruled out would interfere with, if not completely frustrate their ability to attend to the urgent medical conditions and diagnoses that need to be addressed.”

Find out more about the cases in which the AMA Litigation Center is providing assistance and learn about the Litigation Center’s case-selection criteria.

Informed consent is well defined

Mari Yvonne Davies filed a lawsuit alleging that emergency physician Michael Hirsig, MD, failed to diagnose vertebral artery dissection, an injury she believes caused her stroke. An ambulance brought Davies to the emergency department after a single-car rollover crash.

In her lawsuit, she claimed the physician failed to offer her a computed tomography angiography (CTA) scan to detect the alleged injury. Neither Dr. Hirsig nor the radiologist and neurosurgeon he consulted believed there was such an alleged injury, according to court documents. Consequently, no one proposed a course of treatment to treat a diagnosis they did not believe existed.

After a trial, the jury found there was no negligence for misdiagnosis. An appeals court upheld the jury’s verdict on the misdiagnosis negligence claim, but reversed the dismissal of the plaintiff’s informed-consent claim. If Washington’s top court allows that to stand, Davies can take the informed-consent claim to a new jury.

The brief tells the court that, in addition to being inconsistent with state statutes and case law on informed consent, this novel cause of action is inconsistent with the purpose of informed consent in health care.

That purpose is to ensure that the doctor and patients agree about the “proposed treatment for the patient’s body, not to have the patient make the diagnosis,” the brief says. “The failure or decision not to take a diagnostic step—the complaint here—is a professional negligence issue, not a breach of informed consent.”